Supreme Court, U.S.
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No. 87-1002

In the Supreme Court of the United States

OCTOBER TERM, 1987

BENJAMIN OKWUMABUA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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4 pp

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Petitioners contend that the court of appeals erred when it reversed an order of the district court suppressing as evidence statements petitioner Okwumabua had made to a federal agent.

On January 28, 1986, petitioners were charged in an eight-count indictment returned in the United States District Court for the Western District of New York. The indictment charged them with making false statements to the Small Business Administration, in violation of 18 U.S.C. 1001; filing a false claim with the General Services Administration, in violation of 18 U.S.C. (& Supp. IV) 287; and mail fraud, in violation of 18 U.S.C. 1341. Petitioners moved to suppress the statements that petitioner Okwumabua had made during an interview at his office. The interview had been conducted by three members of the General Services Administration (GSA) Inspector General's Office following an audit of a GSA contract. Petitioners also moved to suppress documents that the agents had obtained from petitioners during the audit.

On December 26, 1986, the district court granted the motion with respect to the statement made by petitioner Okwumabua. The court granted the motion on the ground that one of the agents who participated in the interview was a criminal investigator, and that he participated in the interview at a time when a criminal prosecution was predictable but did not inform Okwumabua of his role and purpose (Pet. App. A14-A15).

The court of appeals reversed (Pet. App. A1-A9). The court found that the agent had no duty to inform petitioner Okwumabua that he was conducting a criminal investigation. Accordingly, the court concluded, petitioner's Fifth Amendment right to remain silent had not been violated by deception on the part of the agent. Instead, the court of appeals held, petitioner's statements were the voluntary products of his free and unconstrained choice.

Petitioners contend (Pet. 6-8) that the statements obtained from Okwumabua during the GSA interview are inadmissible into evidence under *United States* v. *Kordel*, 397 U.S. 1 (1970), because of deliberate and deceptive conduct by the agents that violated his Fifth Amendment rights. Whatever the merits of petitioners' contention, it is not presently ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to suppress. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will then be able to present their current claim to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

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* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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